U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 04 2009

SRC 08 058 51162

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and marketer of women's outerwear. It seeks to employ the beneficiary permanently in the United States as a market research analyst. The petition was accompanied by an approved ETA Form 9089 Alien Employment Certification from the Department of Labor. The central issue in this proceeding involves the classification sought. On Part 2 of the Form I-140 petition, Immigrant Petition for Alien Worker, the petitioner checked box "d," indicating that it seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree or an alien of exceptional ability. The director determined that the petitioner had not established that the job requires a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to 8 C.F.R. § 204.5(k)(4).

On appeal, counsel asserts that the director previously approved the petition, precluding the director from denying the petition rather than revoking the approval on notice pursuant to 8 C.F.R. § 205.2. Counsel further asserts that box "d" was checked inadvertently and that the petition should have been filed seeking classification pursuant to section 203(b)(3) of the Act. Counsel submits an approval notice for the petition dated August 26, 2008 and memoranda related to the issuance of requests for additional evidence and notices of intent to deny or revoke. For the reasons discussed below, we find that the petition was never formally approved and that the approval notice was issued in error. In addition, we uphold the director's basis for denial, which, because the record contained evidence of ineligibility, did not require the issuance of a request for additional evidence or notice of intent to deny prior to the final decision.

The Form I-140 was filed concurrently with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, on July 27, 2007. The petitioner checked box "d" under Part 2 of the Form I-140 petition requesting classification as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct." The petition was accompanied by a July 16, 2007 cover letter signed by counsel specifically requesting classification as follows: "Advanced Degree Professional under § 203(b)(2)." Counsel referenced this classification no less than three times in this letter.

We have reviewed U.S. Citizenship and Immigration Services (USCIS) electronic records relating to the petition. These records reveal that the petition was updated as "approved" on August 25, 2008 and that this action was immediately cancelled. Nevertheless, an approval notice was erroneously generated by the system the following day. This action does not constitute a formal favorable adjudication of the petition.

In *Bassey v. INS,* 2002 WL 31298854 (N.D. Cal. 2002), an approval notice and a passport stamp were both deemed insufficient evidence that the alien had adjusted status where the underlying Form I-130 had not been approved. In addition, in *Ayoub v. Chertoff*, 2005 WL 1028180 (E.D. Mich. 2005), a passport stamp was held not to establish adjustment of status where the Form I-485 was denied the day after the passport was stamped. While these cases are district court decisions and

involve adjustment applications, we are persuaded by the reasoning in these decisions that the erroneous generation of an approval notice absent formal adjudication does not constitute an official approval of the application or petition. Thus, we will consider whether the director correctly considered the petition under section 203(b)(2) of the Act and whether a request for additional evidence or notice of intent to deny was required before the final denial was issued.

The burden is on the petitioner to select the appropriate classification rather than to rely on the director to infer or second-guess the petitioner's intended classification. As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as a member of the professions holding an advanced degree or alien of exceptional ability. The petitioner signed the Form I-140 under penalty of perjury, attesting that the information on the form was correct. In addition, counsel referenced the classification in the accompanying cover letter as advanced degree professional pursuant to section 203(b)(2) of the Act. As the petition was unaccompanied by instructions from counsel or the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(2) of the Act. A post-adjudicative alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm'r. 1998). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, 286 Fed. Appx. 963 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[1] If the petitioner now seeks to classify the beneficiary as a professional or skilled worker pursuant to section 203(b)(3) of the Act, then it must file a separate Form I-140 petition requesting the new classification, as it has already done. On appeal and in response to the AAO's motion, counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

The current regulation at 8 C.F.R. § 103.2(b)(8)(i) provides in pertinent part: "If the record evidence establishes ineligibility, the application or petition will be denied on that basis." Further, 8 C.F.R. § 103.2(b)(8)(ii) provides in pertinent part: "If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility . . . ."

Thus, the director is not required to issue a request for additional evidence or a notice of intent to deny in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the regulation at 8 C.F.R. § 103.2(b)(8) does not require solicitation of further

[1] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html.

documentation. As the director correctly adjudicated the petition under section 203(b)(2) of the Act, we will only consider on appeal whether the director correctly denied eligibility under that classification.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered.

USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r. 1986). *See also*, *Madany*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir.7 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual

business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Bachelor's
Major Field of Study: Bus. Adm., Mkt'ing

Experience: 2 years in job offered or related occupation.

Block 15: Blank.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where the job requires only a baccalaureate, it must also require five years of post-baccalaureate progressive experience. As the petitioner was willing to accept a baccalaureate plus only two years of experience, the job did not require a member of the professions holding an advanced degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

Order: The appeal is dismissed.